sidestep the fact that this case deals only with state-law claims under the Kentucky Civil Rights Act, not any federal claims under the ADEA, by alleging that this case has the "same precedential value as though it were . . . litigated under the ADEA." Petition 16. Petitioners' argument should be ignored for what it is – an inaccurate description of the true nature of this case.

For these reasons alone, Petitioners' Petition should be denied.

II. Petitioners' Assertion That the Collectively Bargained Agreement Which Treated Them as New Employees Was Per Se Discriminatory Under the Kentucky Civil Rights Act Lacks Merit.

Petitioners' claim that the collectively bargained agreement under which they were employed by Respondent was facially discriminatory. That claim was, in fact, tried to a jury and the jury decided it was not. Petitioners contend that the district court should have directed a verdict in their favor on this question at trial. The district court correctly refused to direct a verdict in Petitioners' favor and did not grant Petitioners' judgment notwithstanding the verdict and motion for a new trial. The Court of Appeals also properly dealt with this contention, stating:

> Plaintiffs misapprehend the nature of direct proof necessary to sustain their claim in a disparate treatment case. * * * Plaintiffs point to no evidence that Tyson deliberately selected them and intended to discriminate against them on the basis of age. Importantly, Plaintiffs voluntarily chose to retire from SKF prior to the takeover by

> Tyson. Other than pointing to the policy itself, Plaintiffs offer no evidence to suggest that discrimination was at least a motivating factor.

Petition Appendix 15. The Kentucky law provides:

> **344.100. Discrimination in wages or conditions not unlawful when made on basis other than . . . age forty and over. . . .**
>
> Notwithstanding any other provision of this chapter, it is not an unlawful practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . *if the differences are not the result of an intention to discriminate* because of . . . age forty (40) and over. . . ." (Emphasis added).

Thus, in a disparate treatment case under Kentucky law, the plaintiff must put forth some evidence that the protected trait, such as age, was intentional and a motivating factor in the employment decision about which the plaintiff complains. See also, *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). Petitioners failed to present any such evidence, and the jury and lower courts have consistently rejected their claim. The jury was presented with evidence that Respondent's collectively bargained agreement with Petitioners' Union was intended to make a company that had been losing money viable economically so as to preserve jobs and continue in operation. Petition Appendix 17-18. The Court of Appeals noted that there can be no disparate treatment when a company bases its decision on factors only "empirically correlated with age, such as pension status, seniority, or wage rate. *Hazen Paper*, 507 U.S. at 609. . . . " See also, *General Dynamics Land Sys.*,

Inc. v. Cline, 124 S.Ct. 1236, 1244 (2004). The Court of Appeals also rejected Petitioners' argument that the collectively bargained agreement to treat SKF retirees essentially as new employees was using pension status as a "proxy for age" citing *Hazen Paper*, 507 U.S. at 612-13. It stated that:

> In this case, Plaintiffs have offered no facts or direct evidence that Tyson intended for the retiree-applicant policy to discriminate against the employees on the basis of their protected trait of age.

Petition Appendix 19.

Petitioners argue that this Court should grant its petition for a writ of certiorari because litigating a case under Kentucky law is the same as litigating it under the ADEA. That is simply not true. The Kentucky Supreme Court, while relying upon some federal cases as persuasive authority, has fashioned its own precedent when it comes to age discrimination. A case in point is *Harker v. Fed. Land Bank of Louisville*, Ky., 679 S.W.2d 226, 229 (1984), wherein the Kentucky Court established the rule that in order for a plaintiff who is bringing an age discrimination claim under Kentucky law to prevail, that plaintiff must establish "cold hard facts" that age was a motivating factor in the complained of adverse employment action. That standard is not found in the decisions of this Court under the ADEA.

Petitioners also rely heavily upon *TWA v. Thurston*, 469 U.S. 111 (1985). In *TWA*, the airline adopted a policy whereby Captains who became disqualified from serving in that position for reasons other than age automatically were able to displace less senior flight engineers. Captains

disqualified because of age were not afforded this same "bumping" privilege.[4] Instead, they had to use the bidding procedures set forth in the collective-bargaining agreement. If there was no vacancy prior to a bidding captain's 60th birthday, he had to retire. *TWA*, 469 U.S. at 120.

As noted, the TWA policy treated similarly situated employees (i.e., currently employed Captains) differently because of their age (i.e., those disqualified from service as Captain for reasons other than age automatically were able to displace less senior flight engineers, whereas those disqualified because of age were not afforded this same "bumping" privilege). However, in the case at hand, the employees treated differently (i.e., the retiree-applicants) are not similarly situated to the employees who did not terminate employment with SKF before the closing date. The agreement negotiated by the Union and Respondent and applicable to Petitioners actually treated them better than anyone else who would attempt to work at Respondent after quitting their employment at SKF. See footnote 2 supra. Therefore, *TWA* is inapplicable to the case at hand and Petitioners' reliance on the case should be disregarded.

Petitioners' petition for writ of certiorari based on its "per se" disparate treatment theory should be rejected.

---

[4] When *TWA v. Thurston* was decided, Federal Aviation Administration regulations prohibited anyone from serving as a pilot on a commercial carrier after age 60. Flight engineers were not subject to the FAA regulation.

III. Petitioners Were Not Entitled to a Trial of Their Claim that the Collectively Bargained Agreement in Question Had a Disparate Impact on Them Based on Their Age.

A. Petitioners Waived Any Disparate Impact Claim.

Both the district court and the Court of Appeals noted that Petitioners had apparently abandoned their disparage impact claim at the trial court level. The district judge, in ruling on the dispositive motion filed by Petitioners before trial, stated:

> In their response and cross-motion for summary judgment (Dkt # 19), Plaintiffs seem to concede that no disparate impact cause of action exists: "Plaintiffs recognize that most courts have indeed held that proof of a disparate impact of an employer's practice or policy, without more, probably will not serve conclusively to prove age, as opposed to other, forms of discrimination." (*Id.* at 15). Later in the same document, Plaintiffs again seemingly concede the issue by stating that "[e]ven if the Defendant is correct that an age discrimination plaintiff may not solely rely upon a disparate impact analysis to prove his case without proof of intentional discrimination, as may sex and race discrimination plaintiffs, he may rely upon it to [sic] prove intentional discrimination under a circumstantial proof model." (*Id.* at 17.) Similarly, Plaintiffs make no mention of a disparate impact theory in their reply (Dkt. # 24). Indeed, nowhere do Plaintiffs directly argue that they may recover simply by proving a disparate impact. This apparent abandonment of a disparate impact mode of recovery would also justify summary judgment in Defendant's favor.

Petition Appendix 54. The Court of Appeals similarly noted that Petitioners "concede that a cause of action 'probably' does not exist under the ADEA for disparate impact claims." Petition Appendix 24, 27. The Court of Appeals went on to state:

> Further, this case arises in the context of the Kentucky Civil Rights Act, not the ADEA. The Supreme Court of Kentucky has not spoken on this important matter as it relates to its state law. For these reasons, the Court declines the opportunity to opine any further than it has in the past in *Lyon*[*v. Ohio Educ. Ass'n & Prof. Staff Union*, 53 F.3d 135 (6th Cir. 1995)] and *Gantt* [*v. Wilson Sporting Goods, Co.*, 143 F.3d 1042 (6th Cir. 1998)] given the facts presented here.

Petition Appendix 27. This Court should likewise disregard Petitioners' formerly conceded theory of recovery and not attempt to guess at what the Kentucky Supreme Court would do in such a case as this if presented to them.

B. Alternatively, Petitioners Cannot State a Claim Based on Disparate Impact.

Petitioners attempt to rely upon the recent decision in *Smith v. City of Jackson*, 544 U.S. ___, 125 S.Ct. 1536 (2005), in which the Court (5 to 3, with the Chief Justice not participating) held that a limited disparate impact theory of recovery was available under the ADEA. However, the instant case was not brought under the ADEA, but rather the Kentucky Civil Rights Act.[5]

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[5] Justice Scalia's concurrence in *Smith v. City of Jackson* was predicated upon deference to the regulations issued by the U.S. Equal

(Continued on following page)

In any event, as this Court noted in *City of Jackson*, 125 S.Ct at 1545, "it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is 'responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.'" *quoting Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 656 (1989).

Once a claim of disparate impact is established, the case shifts to "any business justification" the employer offers for its use of the practices at issue. *Wards Cove*, 490 U. S. at 658.[6] The justification stage contains two components: (1) a consideration of the justifications an employer offers for use of the practices in question; and (2) the availability of alternative practices to achieve the same business ends, with less impact on the protected status. *Id.* At this stage, the employer has the burden of production, but not persuasion. *Id.* at 660.

Petitioners' argument that an employer must show "business necessity" is erroneous. Petition 23. As the *City of Jackson* decision clearly explains, the employer carries the burden of *producing* evidence of a business justification. The dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment

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Employment Opportunity Commission on the subject. Obviously, EEOC's regulations are not due any particular deference in the Supreme Court of Kentucky.

[6] While amendments to Title VII contained in the Civil Rights Act of 1991, 105 Stat. 1071, modified this Court's holding in *Wards Cove*, the relevant 1991 amendments did not amend the ADEA or speak to the subject of age discrimination. Thus, *Wards Cove's* pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA. *City of Jackson*, 125 S.Ct. at 1545.

goals of the employer. "[T]here is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster. . . ." *Wards Cove*, 490 U. S. at 659.

The ultimate burden of persuasion remains with the disparate-impact plaintiff at all times as it is the plaintiff who must prove that he was discriminated against "because of such individual's age." *Id.* at 659, citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 1232 (1988); see also 29 U.S.C. §623(a). This rule conforms to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration. *Wards Cove*, at 659, citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256-58 (1981).

Here, Respondent stepped in to buy a division of SKF that was failing financially. Therefore, it was imperative for Respondent's management to negotiate concessions from the Union, as well as suppliers, subcontractors, and salaried employees in order to make the acquisition viable.

With regard to the Memorandum of Agreement, various meetings were held with Union representatives, including one of the Petitioners, to negotiate concessions. During these negotiations, the parties eventually agreed upon the very terms being challenged by Petitioners. The Memorandum of Agreement allowed Respondent to reduce its operational costs and operate the business.

The Memorandum of Agreement, under which various employees were treated differently based on when they were hired and whether they ceased employment with SKF prior to the closing date, cannot be evidence of age bias without more. Likewise, the fact that all retiree-applicants described

in the Memorandum of Agreement were over the age of 40 is insufficient in and of itself to establish a claim of disparate impact. As this Court has noted in *Cline v. Gen. Dynamics Land Sys., Inc.*, 124 S.Ct. 1236, 1244 (2004):

> [In] *Hazen Paper* . . . we held there is *no* violation of the ADEA in firing an employee because his pension is about to vest, a basis for action that we took to be analytically distinct from age, even though it would never occur without advanced years. *Id.*, at 611-612. We said that 'the very essence of age discrimination [is] for an older employee to be fired because the employer believes that productivity and competence decline with old age,' *id.*, at 610, whereas discrimination on the basis of pension status '*would not* constitute discriminatory treatment on the basis of age [because t]he prohibited stereotype [of the faltering worker] would not have figured in this decision, and the attendant stigma would not ensue,' *id.*, at 612. (Emphasis added).

Moreover, in both disparate treatment and disparate impact cases, the plaintiff must be able at some point to establish that the stated reason for the employer's action complained of was pretextual. *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2106 (2000); *Wards Cove*, 490 U.S. at 660-61. The issues of whether the Memorandum of Agreement served, in a significant way, the legitimate employment goals of Respondent and whether Respondent's stated reasons for agreeing to the Memorandum of Agreement were pretextual, were argued and put to the jury in this case, albeit under the theory of disparate treatment. The jury returned a verdict in favor of Respondent.

As this Court noted in *City of Jackson*, "[w]hile there may have been other reasonable ways for the [employer] to achieve its goals, the one selected was not unreasonable." *City of Jackson*, 125 S.Ct. at 1546. Here, Respondent, in conjunction with Petitioners' own Union, agreed upon a structure to make the Kentucky operation viable. This, as the jury found, was not based on age discrimination.

Petitioners, even if the theory were available under Kentucky law, cannot state a claim for recovery under a disparate impact theory based on *City of Jackson* and other decisions of this Court cited above.

CONCLUSION

For all of the foregoing reasons and authorities, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CIVIL APPEAL CONFERENCE STATEMENT

CA NO: 03-5870 CASE MANAGER:

Case Name: Charles Mayo Acree, et. al. v. Tysons Bearing Company, Inc.

District: Western Kentucky
Judge: Hon. Thomas Russell

Attorneys	Names	
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District Court Disposition

Judgment/Jury Verdict Damages Denied

Not a cross-appeal
Case has not bee [sic] previously before Court

Case will turn on issue of whether or not "intent" requirement in disparate treatment age discrimination claim under KRS chapter 344 (Kentucky equivalent of ADEA) may be said to exist as a matter of law based upon the facially discriminatory nature of a company policy. Also, does a claim of disparate impact exist where a company policy challenged by plaintiss [sic] has an exclusive impact upon older workers/

This case does not involve a conflict of law within this Circuit or among the Circuits.

Issues Proposed to be raised on Appeal:

See above: Defendant instituted a policy whereby it categorized all of its employees who were receiving any pensions benefits from their previous employer (from whom this Defendant had bought the factory where all of the Plaintiffs worked) as "new hires" under union contract. Non-Pensioners were not so categorized. "New hires" received $3.00 per hour less than other workers and had their vacation benefits reduced. All of the "new hires" had worked in their jobs for the previous owner of Defendant's facility for at least 15 years and had to have either 55 years of age or 30 years of service. The youngest among the group was 49 years of age. The "new hire" group consisted of approximately 70 employees, 50 of whom are plaintiffs in this case. Of the remaining approximately 80-140 employees of the Defendant (depending on employment levels after Defendant bought the plant where it employed the Plaintiffs on June 11, 1999), all but a very few who were hired by the original employer received $3.00 per hour more than the "new hires" for doing the same work, even though the "new hires" had been on their respective jobs, in almost every case, longer than their favored, younger, co-workers.

Plaintiffs believe they were entitled to summary judgment, a directed verdict, or JNOV post-trial, as the policy they attacked was as facially discriminatory as separate restrooms for whites and Blacks. They also believe that they should at least have had a jury instruction on a disparate impact theory.

Furthermore, despite a pre-trial ruleing [sic] that the Defendant could not attempt to shift responsibility for its policy to the Plaintiffs' union representatives, the Court

permitted testimony at trial that set up this very "defense," to the obvious prejudice of the Plaintiffs during the trial.

This is tho [sic] certify that a copy of this pre-conference statement was served on opposing counsel of record this 21st of July, 2003.

/s/ Philip C. Kimball

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No. 05-135

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

CHARLES MAYO ACREE, TWYMAN K. APPLEBY, BRENDA BARTLEY, CHARLES BENNETT, DONALD BENNETT, LOUIS K. BENNETT, JR., AUSTIN BINGHAM, CARL BROWN, DONALD BRUTON, WILLIAM F. BURKS, JR., ISAAC BUTLER, JOYCE CAPPS, EDWARD CLAYWELL, NYMAN CLAYWELL, CHARLES COFFEY, BOBBY DECKARD, EVA ROSE DECKARD, KENNETH DOUGLAS, CHARLES EATON, ROBERT EMBERTON, JERRY FRANCIS, TED GARMON, WILLIAM GARRETT, CURTIS GIBSON, CARLOS GREEN, DANIEL HARPER, WILLIAM HOUCHENS, ROBERT JONES, RICHARD LILE, MAXIE MARTIN, WILLIAM MARTIN, THOMAS MATTHEWS, JOYCE MORGAN, MICKEL MUSE, RANDAL PACE, NOEL PAGE, GENE PEDIGO, CHARLES RICH, CLEVELAN ROACH, LYNDAL RUTLEDGE, RAYMOND SHAW, JR., SELBY SHIRLEY, JACK SHOOPMAN, NILE SMITH, JOE SPEAR, DOUGLAS STEEN, JACKIE SULLIVAN, DAVID TAYLOR, and BILLY YOUNG,

Petitioners,

v.

TYSON BEARING COMPANY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The respondent has advanced several arguments in support of the proposition that the courts below correctly rejected petitioners' claims. These arguments, however, hardly merit that name. They are more aptly characterized as subtle, stealthy, suggestions. If directed to an extremely sympathetic reader, they may ever so slightly sway that reader to be somewhat less hostile to the respondent's obviously discriminatory conduct than he would otherwise be.

Petitioners will refer to respondent's efforts at persuasion as themes.

One of these themes is respondent's implicit characterization of its discriminatory conduct. According to respondent, if it discriminated in any manner against the "retiree-applicants," it did so only upon the basis that these individuals, " . . . had retired from SKF prior to the closing date," of SKF's sale of its tapered roller bearing facility to respondent. The respondent asserted that this distinguished the "retiree-applicants; from their co-workers because the latter group were, "active SKF employees" as of the "closing date" of SKF's sale of one part of its Glasgow facilities to respondent (brief in opposition, p. 4).

Respondent's suggested dichotomy is a weak effort to mask three facts. One fact is that the employment relationship with SKF of each and every member of both of respondent's suggested categories of employees was permanently and irrevocably severed by SKF as of the "closing date" of its sale of certain assets to respondent. Another fact is that the employment relationship with respondent of each and every member of both of respondent's suggested categories of employees began on the very

date of the sale. The third fact is that the "retiree-applicant's" status with SKF as retirees is but another way of describing their pension status with SKF.

As petitioners have previously stated, the "retiree-applicants'" pension status was analytically identical with their age over 46 years, thus making it a "proxy" for age discrimination under *Hazen Paper Company v. Biggins*, 507 U.S. 604, 613-614 (1993). Respondent has cited no authority for its implicit suggestion that the "retiree-applicants'" status as "retirees," as opposed to "pensioners" entitles it to a more favorable analysis than that set forth in *Hazen, Id.*

There is, of course, no such authority. Whether we focus upon the "retiree-applicants'" status as retirees or their status as pensioners the result is the same: respondent subjected them to a policy that was facially discriminatory against them because of their age, 46 years and over.

Respondent did not resort to euphemism when this case was before the district court. In its initial motion for summary judgment, it argued forthrightly that the *Hazen* opinion stood for the proposition that an employer who discriminated against its employees upon the basis of their pension status would, because of that fact, *never* be liable for age discrimination!

Respondent has apparently seen the error of its direct approach into the legal minefield awaiting it upon confronting the central issue of this case; hence its resort to a weak effort to divert attention away from the petitioner's pension status.

Respondent's next theme is that the petitioners' Union is responsible for respondent's discriminatory "retiree-applicant" policy. Of course, it dares not directly articulate this argument. Instead, it contents itself with repeatedly referring to the "retiree-applicant" policy as part of the "Collectively Bargained Agreement," along with several mentions of "negotiations" with the Union that produced, " . . . the very terms being challenged by petitioners." (brief in opposition, p. 2-3, 14).

The district court set forth the law of the case on the subject of the Union's responsibility for the "retiree-applicant" policy in its opinion of January 7, 2002 (appendix for the court of appeals, p. 101); it is that:

> . . . it is impossible for the union to have been "the primary efficient cause" of any discrimination arising from the Union-Tyson collective bargaining agreement. At best, the union shares fault with Tyson for the existence of the discriminatory scheme, but could not have been primarily responsible for it when Tyson also contractually bound itself to the collective bargaining agreement and, unlike the union, undertook to implement the agreement's terms.

In short, it does not really matter who thought up the "retiree-applicant" policy: the union or the respondent.

Indeed, it does not matter what even the respondent was thinking or even intended, when it adopted and enforced the policy.

The state of mind, motive, intent, or purpose of an employer who enforces a facially discriminatory policy is

completely irrelevant in a case such as this.* Any "intent" requirement is satisfied by the employer's enforcing a facially discriminatory policy; after all, such enforcement is certainly an "intentional" act!

Petitioners previously cited *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985) for this proposition (petitioner's brief, p. 19). Perhaps some additional exposition is in order.

We may concede that Tyson's only "specific intent" in this case was to save money. We may believe that it harbored no "discriminatory animus" toward its older employees whatsoever. Indeed, it would be contrary to all of the laws of human nature if Tyson's top managers were hostile to its older workers, a large group of whom were saving it $3.00 per hour by coming to work every day while all but a handful of their co-workers earned that amount more than the "retiree-applicants." Because the "retiree-applicant" policy was discriminatory on its face it was an act of discrimination against those whom it affected; just as a municipality's banning individuals over the age of 40 years or African-American from its public swimming pools would be an act of discrimination requiring no inquiry whatsoever into the municipality's state of mind!

If the Court believes that there is some sort of "intent" or "motive" requirement even in cases such as this one, it could be satisfied by simply holding that an employer who adopts and enforces a facially discriminatory policy is

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* It may be relevant to a consideration of "liquidated damages" under the ADEA, *Trans World Airlines v. Thurston*, 469 U.S. 111, 126-133; such damages are not available under the Kentucky Civil Rights Act; nor are punitive damages.

conclusively presumed to harbor discriminatory animus or motive.

The respondent's third theme is that the petitioners received additional benefits that substantially offset the $3.00 per hour wage cut and the reduction in their vacation benefit that they suffered as a result of the "retiree-applicant" policy. Respondent relegated this particular theme to the same footnote to which the opinion of the court of appeals assigned it (brief in opposition, p. 2-3, footnote 2; opinion of the court of appeals, petitioners' brief, APX, p. 4-5, footnote 4).

In reality, there were, and are, no additional benefits exclusively for the "retiree-applicants," among the purported lists thereof in the respective footnotes cited above. Petitioners conclusively established this fact at pages 7-8 of their original brief in this case.

The respondent's fourth theme is that there is some sort of independent basis in Kentucky law that justifies the disposition of this case by the courts below.

Respondent cites Kentucky Revised statutes § 344.100 for the proposition that an age discrimination plaintiff must prove an "intention to discriminate" in order to prevail upon such a claim.

KRS § 344.100 applies *only*, by its express terms, where an employer can point to, " . . . a bona fide seniority or merit system."

There is no seniority or merit system at issue in this case; in fact, respondent specifically agreed to honor the seniority of *all* former SKF employees when it hired them. Obviously, all of the "retiree-applicants" had at least ten and as much as 30+ years of seniority with respondent and

seniority could not have formed the basis of any policy that deprived them of wages and benefits.

In addition to KRS § 344.100, respondent cites the case of *Harker v. Federal Land Bank of Louisville*, Ky., 697 S.W.2d 226, 229 (1984) for the proposition that, " . . . litigating a case under Kentucky law is [not] the same as litigating it under the ADEA," (brief in opposition, p. 9).

In *Harker*, *Id.*, the Kentucky Supreme court specifically noted that:

> The Kentucky age discrimination statute is specifically modeled after the Federal law [the ADEA]. Consequently, in this particular area, we must consider the way the Federal act has been interpreted.

The Court also noted that in age discrimination in employment cases, " . . . we must review the Kentucky statute and look for guidance in interpreting it to the Federal law," of employment discrimination, *Id.*

In *Harker*, the Court stated that it had to decide which of two federal court approaches to age discrimination cases it should adopt for deciding cases brought under the Kentucky Civil Rights Act, where the plaintiff relied upon circumstantial evidence. The Court adopted the approach then employed by the United States Court of Appeals for the Sixth Circuit. It characterized this approach as using:

> . . . a but/for test or the equivalent of a third stage pretext analysis without regard to whether or not the initial two stages of the *McDonnell-Douglas* test have been met. In the absence of specific evidence of age discrimination, a summary judgment is proper, *Rose v. NCR Corp.*, 703

F.2d 225 (6th Cir. 1983), *cert. den.*, ___ U.S. ___, 104 S.Ct. 352, 78 L.Ed.2d 317 (1983).

Id. at 230.

Respondent has not disputed the fact that the courts below relied exclusively upon federal employment discrimination jurisprudence in deciding this case (opinion of the court of appeals, petitioner's brief, APX, p. 12; opinion of the district court, 12-30-02, petitioner's brief, APX, p. 37, note 3; opinion of the district court, 2-7-03; petitioners' brief, APX, p. 49). *Harker* stands for the proposition that they were correct to do so.

Respondent asserts that *Harker* requires that an age discrimination plaintiff, "... must establish 'cold hard facts' that age was a motivating factor in the complained of adverse employment action," in order to prevail (brief in opposition, p. 9).

What the court really said in *Harker*, *Id.*, at 229, was that:

> ... the special rule for age discrimination summary judgments is whether the plaintiff has proof of "'cold hard facts' creating an inference showing age discrimination was a determining factor" in the discharge.

Obviously, this standard is beside the point in the case at bar. This is because, again, the respondent's specific motive or intent is not an element of the petitioners' proof, which does not rely in any manner upon inferences. In turn, this is because of the facially discriminatory nature of the policy at issue.

Even if motive or inference were at issue in this case, it is hard to imagine any "colder" or "harder" facts creating

an inference showing age discrimination than an employer's enforcement of a facially discriminatory policy! Indeed, such a policy creates a *conclusive* inference of discrimination, if we even need an inference in our case.

As the courts below clearly understood, litigating this case under the Kentucky Civil Rights Act is identical for issues of liability to litigating a case under the ADEA.

Respondent's fifth theme is that the petitioners "waived" or abandoned their disparate impact theory of recovery. In support of this assertion, respondent cites the district court's pre-trial Order dismissing the petitioners' disparate impact claim (brief in opposition, p. 11). Even if the district court did, in fact, believe that the petitioners had "waived" this theory of recovery, the court of appeals obviously disagreed, as it spent four pages discussing the merits of the disparate impact theory (petitioners' brief, APX, p. 24-27).

It is true that the petitioners conceded that as federal case law stood prior to *Smith v. City of Jackson*, 544 U.S. ___, 125 S.Ct. 1536 (2005), they could rely only upon a "circumstantial model" of proof of disparate impact, as set forth in the case of *Gonzalez v. City of New Braufels*, 176 F.3d 384, 389 (5th Cir. 1999) [appendix for the court of appeals, p. 56].

The court of appeals opined that the petitioners argued:

> . . . that they have established a case of disparate treatment by virtue of a wage scale that had a disparate impact on older workers, (opinion of the court of appeals; petitioners' brief, APX, p. 27).

Even if this were correct, and the petitioners did not pursue a "pure" disparate impact theory of recovery, they should have been permitted to submit their "hybrid" or circumstantial disparate impact theory to the jury. They tendered an instruction incorporating this theory of recovery for submission to the jury; the district court refused to submit it (appendix for the court of appeals, p. 55-60).

Ironically, petitioners' proposed instruction on this issue virtually "tracks" the legal principles set forth in *Smith v. City of Jackson*, *supra*, as the respondent itself has outlined these principles at page 113 of its brief in opposition!

Petitioners' proposed instruction predicated a finding of liability under a circumstantial disparate impact theory upon the jury's believing from the evidence:

> That the policy of the Defendant described above [the "retiree-applicant" policy] had the effect of discriminating against the Plaintiffs and other "retiree-applicants" because of their age over 40 years and that the Defendant could have avoided the policy by instituting an across-the-board wage cut among all of its employees of substantially less than the pay cut to which it subjected the Plaintiffs and the other "retiree-applicants," (appendix for the court of appeals, p. 59-60).

It was clear error for the court of appeals to refuse to at least reconsider its opinion in light of *Smith v. City of Jackson*, as petitioners requested pursuant to FRAP 28(j) (petitioner's brief, APX, p. 67), and to reverse and remand this case for a new trial.

* * *

Basically, the opinion of the court of appeals stands as a stark and quite explicit denial of what should be, " . . . the unequivocal principle than an employer's facially discriminatory policy will in every instance and without more entitle an ADEA claimant to judgment as a matter of law," in the words of the court itself (opinion of the court of appeals, petitioners' brief, APX, p. 14-15). The court's justifications for denying this important principle are patently unpersuasive.

The respondent has asserted that, " . . . it cannot be seriously claimed that the court of appeals departed from the accepted and usual course of judicial proceedings," (brief in opposition, p. 6). Perhaps the respondent is as wrong on this point as it is on so many others. At any rate, the preservation of the principle that facial, overt, and obvious discrimination in employment should not be tolerated is clearly of sufficient importance to justify this court's exercise of its authority to grant a writ of certiorari.

Respectfully submitted,

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